

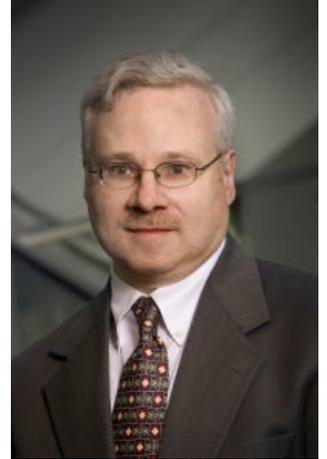
Attorneys React To High Court's Sarbanes-Oxley 'Fish' Ruling

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Law360, New York (February 25, 2015, 8:54 PM ET) -- On Wednesday, the [U.S. Supreme Court](#) ruled that an anti-shredding provision of the Sarbanes-Oxley Act does not cover all physical evidence. Here, attorneys tell Law360 why the decision in *John L. Yates v. United States of America* is significant.

Ross A. Albert, [Morris Manning & Martin LLP](#)

"Hoorah for common sense! This decision likewise represents a victory over the ever-expanding efforts of overly creative prosecutors to make federal crimes out of acts seemingly well beyond anything Congress ever actually considered when enacting a given statute. Here prosecutors managed to obtain a criminal conviction under the Sarbanes-Oxley Act of 2002 for the alleged destruction of three undersized fish. As we all know, SOX was passed in response to the corporate cooked-book scandals of the early 2000s, mostly notably Enron and WorldCom, in which document destruction and shredding played a key part in the cover-up of the fraud. It is difficult, if not impossible, to say that Congress had in mind the destruction of fish when it passed the relevant provision of SOX, even though fish fall within the dictionary definition of 'tangible object.'"



Robert J. Anello, [Morvillo Abramowitz Grand Iason & Anello PC](#)

"The impact of the court's decision in *Yates* will not be with respect to its effect on obstruction prosecutions or cases involving undersized fish. Its legacy will be the majority's instruction to lower federal courts on how to apply the canons of statutory construction to criminal statutes. As Justice Ginsburg's plurality opinion and Justice Alito's concurrence make clear, those canons have replaced legislative history as the basis for interpreting federal criminal statutes. Justice Alito's concurrence, in particular, concisely applies traditional canons of statutory construction cloaked with interesting Latin terms such as *noscitur a sociis* and *eiusdem generis*, and offers a road map for lower federal courts grappling with the meaning of federal criminal statutes."



Jeff Ansley, [Bell Nunnally & Martin LLP](#)

"Sarbanes-Oxley was designed, in part, to protect investors from the impact of improper document destruction, restoring trust in the markets following Enron. The Supreme Court's split holding rightly rejected an expansive application of the concept of 'tangible object' within Section 1519. The court concluded the term refers to information, not to physical evidence such as discarded fish. The court rejected the government's invitation to stretch Section 1519 beyond its moorings to an application far afield from its intended use — protecting investors from corporate and accounting deception. The court should be applauded for refusing to pound a square peg into a round hole."



Ellen Brotman, [Montgomery McCracken Walker & Rhoads LLP](#)

"This is a small victory in the fight against the 'overcriminalization' of the federal criminal code. Overcriminalization has been a product of Congress' desire to be seen as 'tough on crime' and has resulted in overbroad criminal statutes, statutes without meaningful intent requirements and statutes that expand criminal liability into traditional civil and regulatory enforcement areas. This trend has had disastrous consequences on our criminal justice system from the overincarceration of our citizens to the death of the federal criminal trial.

As even the dissent said, this trend has created too much power for prosecutors, too harsh sentences and is 'an emblem of a deeper pathology in the federal criminal code.'"

Nicolas Bourtin, Sullivan & Cromwell LLP

"This decision is noteworthy for two reasons. First, the composition of the plurality and the dissent shows how unpredictable this court is, particularly on criminal law issues. And second, all three opinions reflect that across the court's ideological spectrum, there continues to be deep concern about unchecked enforcement of broadly worded criminal statutes and the overcriminalization of our society."



Meg Campbell, Ogletree Deakins Nash Smoak & Stewart PC

"Despite differences between some of the justices' positions and analyses in Yates and Lawson v. FMR, the significance of Yates is its consistency with Lawson. The focus of the plurality in Yates is, as it was in Lawson, on a consideration of the circumstances that gave rise to Sarbanes-Oxley, and more particularly, on the acts and actors in the Enron debacle. In Lawson, the result was a broad reading of the statute's protection to extend to the types of people involved in the Enron frauds. In Yates, the result is narrow; the Enron actors destroyed documents, not fish."



David M. Eisenberg, Baker Sterchi Cowden & Rice LLC

"It is especially interesting that the justices, all attempting to ascertain the 'plain meaning' of statutory language, and to apply established rules of statutory construction, ended up in three different camps, in a 4-1-4 decision that was not split along the court's customary ideological lines. The main opinion is by Ginsburg, joined by Roberts, Breyer and Sotomayor, with Alito concurring separately. What will this mean for the Affordable Care Act case, King v. Burwell, scheduled for argument next week, where, once again, statutory construction is at the very heart of the matter? Stay tuned."



Philip Hilder, Hilder & Associates PC

"The high court ruled that Section 1519 targets not all manner of evidence, but records, documents and tangible objects used to preserve them, e.g. computers, servers and other media on which information is stored. 'Tangible object' in Section 1519, the Supreme Court concluded, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world."

Diana Lloyd, Choate Hall & Stewart LLP

"The Yates decision is a welcome ruling for those increasingly concerned about the government overreaching to apply certain statutes to criminalize behavior beyond what one would reasonably understand to be prohibited. The notion that the Sarbanes-Oxley 'anti-shredding' provision would ever be applied to fish thrown overboard is bizarre on its face, yet that is exactly what the government sought to do in Yates. Indeed, the government's view was that Section 1519 could be applied to any tangible object. Although the plurality and concurring opinions focused on canons of statutory construction rather than real-world implications, it is important to recognize that Section 1519 is a criminal statute with a maximum penalty of 20 years in prison. At oral argument, Chief Justice Roberts recognized the dangerous leverage prosecutors would have under the government's interpretation. Thankfully, the court rejected such a broad interpretation."



Daniel Marx, Foley Hoag LLP

“The court narrowly reached the right result in Yates. But the decision demonstrates how malleable the canons of statutory construction can be — what does 'ordinary meaning' mean and how much context puts words 'in context?' It also shows the importance of having the courts check prosecutors who adopt sweeping interpretations of criminal statutes that greatly expand criminal liability in ways that Congress did not clearly intend and that do not make sense. That is particularly true in cases like Yates where other perfectly adequate, albeit less harsh, criminal laws are on the books to the extent prosecution may be warranted.”

Tom Rohback, [Axinn Veltrop & Harkrider LLP](#)

“The Yates decision will likely have a greater impact on statutory interpretation generally than on the interpretation of the Sarbanes-Oxley Act. Justice Ginsburg’s analysis of various canons of statutory construction — as well as the equally erudite dissenting opinion — will be quoted in a wide variety of statutory cases. Surely, Congress did not contemplate the throwing overboard of a red grouper to be within the purview of SOX’s condemnation of the destruction or falsification of 'any record, document, or tangible object.' Yet the court’s interpretation of 'tangible object' could conceivably have SOX ramifications if the tangible object destroyed is not a computer hard drive, but a company’s prototype invention on which the company based its fraudulent business practices. In any event, this red herring was not placed on the scales of justice.”

Pratik Shah, [Akin Gump Strauss Hauer & Feld LLP](#)

“The decision might be most notable for what it says about the justices’ approach to statutory interpretation. Interestingly, the chief justice joined Justice Ginsburg’s plurality opinion adopting a contextual approach to statutory interpretation that relied heavily on 'the broader context of the statute as a whole,' whereas Justice Kagan penned a dissenting opinion that relied foremost on the plain meaning of the term 'tangible object' in isolation. Query whether this has any implications for the statutory interpretation question in the highly anticipated Affordable Care Act case, King v. Burwell.”

Joseph C. Toris, [Jackson Lewis PC](#)

“While the destruction of evidence, i.e. fish, in Yates seemed to technically fall within the language of Sarbanes-Oxley, the Supreme Court found it was not logically within the original intent of the statute: addressing accounting fraud by publicly traded companies. Although the scope of the act has grown over the years through judicial interpretation, it is hard to imagine Congress, in enacting SOX, intended it to address a ship captain’s attempt to evade a citation. Although the court rejected application of the act in this extreme example, the preservation of information, whether in electronic or documentary form, remains of paramount importance.”

--Editing by Chris Yates and Mark Lebetkin.

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